No. 87-794

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

CHARLES PENMAN,

Petitioner,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA AND THE PUBLICISTS, LOCAL 818,

Respondent.

On Appeal from the Supreme Court of California

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

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Respondent's attempts to evade liability in its Opposition runs the gamut from a denial that the international union was "never a party" to this lawsuit 1/ all the way to the baseless contentions that the arbitrability issue involving the 1979-82 Agreement is "unnecessary to" this Court's decision (Opp. pp. 8-9), that the evidence of the conspiracy between the Respondent

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1/ The international union and its Local 818 (Tr. 3) were named in the First Amended Complaint and the designation has appeared consistently in all Petitioner's papers since then. They are referred to collectively as they always have been, as "Respondent".

and WBI is objectionable hearsay (Opp. pp. 10, 22) and that, in any event, St. Johns committed no more than an innocent error of judgment. (Opp. pp. 15-22). These transparent attempts to establish innocence in the light of the patently bad faith revelations summarized in the Petition only focuses more clearly on Respondent's guilt.

I.

THE QUESTION OF THE 1976-1979 AGREEMENT'S SUBSTANTIVE ARBITRABILITY OF PENMAN'S DISCHARGE IS MATERIAL TO RESPONDENT'S MISREPRESENTATIONS.

Respondent's attempt to defend the Court of Appeal's faulty interpretation that the insertion of "including discharges for cause" into Article 7, the grievance procedure provision, where no such language existed before had absolutely no substantive affect on WBI's duty to arbitrate discharge grievances and its attempt to prop up the conclusion that the new language in Article 7 "should not be entitled to any significance" (Pet. A-10, l. 8) is a vain attempt to escape the admonition repeated again and again by this Court that "[d]oubts (about arbitrable disputes) should be resolved in favor of coverage." Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960). The substantive arbitrability of Penman's discharge is absolutely essential to making a finding of Respondent's bad faith. Penman's attorney, Lowe, had become convinced that under the 1976-79 Agreement an arbitrator would find no basis to hold that his discharge greivance was even arbitrable because of Penman's absence from the Industry Experience Roster. Had Lowe known that the dramatic change in the wording of Article 7 provided for all discharges to be tested by cause, he need not worry any more about his concern for Penman's lack of status with the Roster. Knowing then that Penman must exhaust his arbitrable

rights, under the 1979-82 Agreement, he would have certainly opted for arbitration rather than for a state law wrongful discharge suit that would be preempted. Accordingly, the change in Article 7 was a material change and Lowe would be expected to notice that change. Because of St. Johns' representation that there was "no substantial change in the Charles Penman situation" was a material misrepresentation, it had a substantial effect on Penman's arbitration rights.

II.

RESPONDENT VIOLATED VACA V. SIPES UNDER BOTH THE SEVENTH AND NINTH CIRCUIT STANDARDS.

A. The Court of Appeal Ignored the Rule in Dutrisac v. Caterpillar Tractor Co. and Other Ninth Circuit Precedent.

Respondent insists that the Court of Appeal followed Ninth Circuit law. (Opp. p. 13). While the opinion below cited Dutrisac v. Caterpillar Tractor Company, 729 F.2d 1270 (9th Cir. 1983) and other Ninth Circuit cases, it is manifest that the Court of Appeal did not really apply the Ninth Circuit rules enunciated by Dutrisac and its predecessor, Robesky v. Quantas Empire Airline, Ltd., 573 F.2d 1082 (9th Cir. 1982). Nowhere was there an analysis of the presence of "reckless disregard", or "severe prejudice" of Penman, or serving the policies "shielding the union from liability". (Robesky, 573 F.2d at 1090) or the "unexplained and unexcused" conduct of St. Johns (Dutrisac, 749 F.2d at 1273). Nor was there any analysis made as to whether there was a "ministerial act" involved, as opposed to an "exercise of judgment". Zuniga v. United Can Co., 812 F.2d 443, 451 (9th Cir. 1987). Because the Court of Appeal ignored all these tests, rushed to judge St. Johns' conduct as merely errors

in judgment based on contract misinterpretations, and dismissed the case based on St. Johns' "simple negligence" (Pet. pp. A-14 - 16), whether or not it said so, it really applied the stricter standards of the Seventh Circuit, not the Ninth Circuit tests, and rejected Penman's arguments because it failed to find "intentional fraud". (Pet. pp. 21-22).

B. St. Johns' Guilt Did Not Involve Contract Misinterpretation.

Respondent desperately attempts to seek refuge for St. John in terming his misrepresentation of the 1979-82 Agreement as his "best judgment of the meaning of a new agreement not yet reduced to writing" (Opp. p. 20). However, Respondent ignores the fact that the Memorandum of Agreement highlighted the Article 7 change as paragraph 7, one of 14 enumerated changes (besides wage scale changes) and that 5 out of 6 employer representatives executed said document on December 17, 1979, one day before St. Johns' misleading December 18, 1979 letter. (Tr. 452-458). There is no basis for any innocent confusion here. This was not a matter of contract interpretation or poor exercise of judgment; it was "reckless disregard" on St. Johns' part which "severely prejudiced" Penman which went "unexplained and unexcused". Arbitrary conduct and bad faith are rampant, if the Ninth Circuit test is used.

C. Gary's Evidence of Respondent-WBI Complicity is Subject to Hearsay Exceptions.

Respondent's final attempt to seek a safe harbor for St. Johns' conduct is to argue that the WBI interoffice memorandum from Gary to Ballance repeating St. Johns' assurances that Respondent will only go "through the motions" for Penman and that Respondent is "supporting us, and has all along" (Tr. 468-470) is

objectionable hearsay. (Opp. pp. 10, 22). However, Gary adopted and affirmed the statements in her deposition testimony. (Tr. 469-471). Gary's testimony that St. Johns uttered these statements, while hearsay, would be clearly admissible under at least two hearsay exceptions: (1) as an admission on St. Johns' part (California Evidence Code, Section 1220) and (2) as evidence of St. John's then existing state of mind (California Evidence Code, Section 1250). Of course, Respondent neglected to explain how the St. Johns-Lowe-Penman correspondence wound up in WBI's personnel file dealing with Penman as there is no defense to this violation of confidence. With this supporting evidence, Respondent's conduct was intentional fraud directed and focused on Penman so that even the stricter Seventh Circuit test of "bad faith" was satisfied here.

For all the above reasons, Lowe was clearly duped. Without a true picture of the terms of the new agreement before him, it could hardly be said that he made a "conscious decision" not to go to arbitration. Likewise, any conclusion by Lowe that he thought resort to arbitration was futile (Opp. p. 4) was arrived at without adequate data. And irrespective of whether Lowe as an attorney should not have allowed himself to be duped, he should have been able to place some trust in his client's union which owed him a "fiduciary obligation" as his collective bargaining representative. Brady v. TWA, Inc., 401 F.2d 87, 94, fn. 18 and cases cited therein, (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969)

III.

RESPONDENT IS ALSO GUILTY OF EQUITABLE ESTOPPEL RESPECTING ST. JOHNS' MISREPRESENTATION.

Notwithstanding all of the above, Respondent denies it gave Lowe any false information. After giving Lowe copies of the

1976-79 Agreement and copies of arbitration decisions interpreting the old agreement unfavorably to Penman, while Respondent informed Lowe that Article 68(c) was eliminated, Respondent parted company with the truth and with its duty to deal with its member in good faith. It failed either to provide Lowe after his requests with a copy of the 1979-82 Agreement vital for his needs and then threw out a smoke screen by lying to him that "there is no substantial change in the Penman situation" because of the amended contract. Clearly, Penman and Lowe relied on the misrepresentation to their detriment. Respondent must now answer for it.

CONCLUSION

Respondent's Opposition not only is unsuccessful in concealing the weaknesses in its position but also it lays open the serious errors on the part of the California courts in misapplying federal labor policy. To undo these errors, this Honorable Court should now grant this Petition, clarify whatever rules should apply and remand this case back to the California Superior Court for trial.

Dated at Los Angeles, California, this 31st day of December, 1987.

Respectfully submitted,

CHARLES PENMAN

By: 

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and am not a party to the within action; my business address is: 3424 Wilshire Boulevard, Suite .000, Los Angeles, California.

On December 31, 1987, I served the within Reply To Respondent's Brief In Opposition To Petition For a Writ of Cetiorari To the Court of Appeal Of The State Of California, Second Appellate District, Division Three;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Leo Geffner
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All required parties have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 31, 1987, at Los Angeles, California.

Tina Hamilton
TINA HAMILTON